

NO. A07-1758

State of Minnesota
In Court of Appeals

LAKE FOREST TOWNHOMES
CONDOMINIUM ASSOCIATION,

Appellant,

v.

WASHINGTON MUTUAL BANK, F.A. AND
JOHN ELFELT AND STACEY ELFELT,

Respondents.

APPELLANT'S REPLY BRIEF

HELLMUTH & JOHNSON, PLLC
Erik F. Hansen (#0303410)
Joel A. Hilgendorf (#315953)
Chad A. Johnson (#225149)
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
(952) 941-4005

Attorneys for Appellant

MACKALL, CROUNSE & MOORE, PLC
Patrick C. Summers (#028841X)
1400 AT&T Tower
901 Marquette Avenue
Minneapolis, MN 55402
(612) 305-1400

*Attorneys for Respondent
Washington Mutual Bank, F.A.*

John Elfelt and Stacey Elfelt
1612 Third Avenue
Anoka, MN 55303
(763) 421-6319

Pro Se Respondents

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ARGUMENT

I. The District Court Erred in Giving the Washington Mutual Mortgage Priority over the Association.

Washington Mutual ignores, as it must to prevail, Minnesota's Recording Act Statute, Minn. Stat. § 507.34, which provides that a purchaser may rely upon the recorded priority as it appears in the county recorder's office. Instead, Washington Mutual urges the Court to impose upon Lake Forest Townhomes Condominium Association (the "Association") a requirement that they inquire into the priorities of all of the encumbrances recorded against the property, even those that appear on their face to be junior.

There is no support for Washington Mutual's contentions that the Recording Act does not protect the Association. Nor is there support for its contention that the Association is not a bona fide purchaser under the Recording Act and thus entitled to obtain the property free and clear of the Washington Mutual mortgage both by virtue of its second position based upon MCIOA and by virtue of its purchase at the foreclosure sale.

Washington Mutual is correct that the Association does not challenge the District Court's conclusion that Wells Fargo had actual notice of the Washington Mutual mortgage. However, that point is irrelevant to the analysis here. What is relevant is the Association's knowledge of the relative priorities of the encumbrances against the property. The Association's knowledge of the relative priorities of the encumbrances is

critical for both the analysis under MCIOA and for the analysis of the Association's purchase of the property from its own foreclosure sale.

A. The Association is Entitled to Protection from the Recording Act on its' MCIOA Lien.

Washington Mutual contends that because its mortgage, which it concedes was recorded after the Wells Fargo mortgage, was recorded before the Association filed its lien that the Association had knowledge of the lien. This is conceded. The Association knew at the time it filed its lien that there were two other encumbrances on the property; the Wells Fargo mortgage and the Washington Mutual mortgage. What the Association **did not know** was that Washington Mutual contended that the recorded priority of the liens was incorrect.

It is this knowledge, or lack thereof, that controls this action.¹ In Minnesota, the order of encumbrances as it appears in the office of the county recorder is conclusive unless a party has actual, implied, or constructive notice of inconsistent rights held by others. *Minnesota Cent. R. Co. v. MCI Telecommunications Corp.*, 595 N.W.2d 533, 537 (Minn. Ct. App. 1999). "The registration document numbers are conclusive evidence of the order in which the mortgages [are] filed and demonstrate [which mortgage is] registered first." *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854, 857 (Minn. Ct. App. 2002).

¹ Washington Mutual cites to a number of cases to establish that a party who has actual notice of another encumbrance cannot rely upon the recording act to defeat those encumbrances. The Association does not disagree. However, the cited cases are inapplicable as the Association had no knowledge of Washington Mutual's claim to a superior priority.

It is undisputed that the registration documents showed Washington Mutual's mortgage to be junior to Wells Fargo's mortgage at the time the Association's lien was filed. As such, the lien took second position to the Wells Fargo mortgage. Washington Mutual has never put forward any evidence to demonstrate actual, implied, or constructive notice on the part of the Association that it knew that the priority in the county recorder's office was wrong.

Washington Mutual, recognizing the Association's lack of knowledge, nevertheless contends that the Association, and all other community associations, is under a greater obligation than any other party and must investigate each encumbrance to determine if there are irregularities and bring a quiet title action if there are concerns. *Respondent's Brief, pg. 16.* Washington Mutual's argument that the Association should be held to a higher level of investigation and cannot rely on the records of the county recorder must fail. Such an argument, were it to be upheld, eviscerates Minnesota's race-notice recording act.

Washington Mutual further contends that the analysis conducted by the District Court was correct and that the District Court properly substituted the Washington Mutual mortgage for the Wells Fargo mortgage. Washington Mutual goes on to assert that its foreclosure eliminated all other interest in the property. *See Respondent's Brief, pg. 12.*

However, this claim demonstrates why the District Court erred in its analysis. At the time that Washington Mutual foreclosed its lien, the order of priority, as shown in the county recorder's office was: the Wells Fargo mortgage, the Association lien and the Washington Mutual mortgage. Thus, when Washington Mutual foreclosed its lien on

July 21, 2005, neither the Association nor Wells Fargo redeemed because, on its face, those interests were preserved. Yet, Washington Mutual would have this Court hold that those interests were eliminated by Washington Mutual's foreclosure because the *true* order of priority was that the Washington Mutual mortgage was first.

Washington Mutual's argument demonstrates the need for a recording act. The priority of interests is critical when a foreclosure occurs because junior interests are eliminated. Here, according to Washington Mutual, the Association lost its lien because of Washington Mutual's foreclosure even though the Association had no way of knowing that the priority recorded in the county recorder's office was wrong.

Washington Mutual's claim that it can ignore the Recording Act and eliminate the interest of others without notice is not supported by law or equity. The Association, like any owner of an interest in real property, is protected from unrecorded interests in land. The Association did and should be able to rely on the property records in its actions. It is Washington Mutual, who failed to act when it knew there was a problem, whose interest must be impaired.

B. The Association is a Bona Fide Purchaser.

Washington Mutual contends that the Association was not a good faith purchaser. The sole basis for this claim appears to be that the Association's lien was akin to a lien held by a judgment creditor. *Respondent's Brief*, pg. 15. Washington Mutual is drawing a false distinction. It does not matter what the source of the Association's lien was. Whether as a judgment creditor, a mechanics lien holder, or a mortgage holder, a party that has a valid lien against real property may foreclose that lien.

The Association did precisely that. They foreclosed a valid lien and bought the lien at auction like any other lien holder. At the time the Association bought and paid for the property at its foreclosure sale, it had no knowledge of the dispute in priority between Washington Mutual and Wells Fargo. Nor did Washington Mutual act to assert a challenge to priority during the redemption period from the Association's foreclosure. As such, the Association is and was a bona fide purchaser of the property and is entitled to take the property free and clear, subject only to the Wells Fargo mortgage.

The fact that Washington Mutual later attacked the Wells Fargo mortgage priority does not revive its interest in the property vis-à-vis the Association. Washington Mutual lost its ability to claim a greater interest than that held by the Association when it let the redemption period from the Association's foreclosure sale lapse, relinquishing Washington Mutual's claim at least as to the Association.

None of the cases offered by Washington Mutual require a different result. Accordingly, the judgment by the District Court must be reversed and the property awarded to Lake Forest Townhomes.

CONCLUSION

The Association was a bona fide purchaser at the foreclosure sale and thus is not subject to Washington Mutual's mortgage. Because the Association had no knowledge of Washington Mutual's claim and Washington Mutual slept on its rights during the pendency of the redemption period from the Association's purchase, Washington Mutual's claim is permanently extinguished.

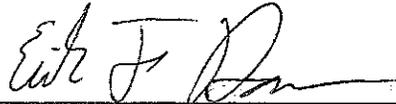
Furthermore, the Association was entitled to rely upon the records of the county recorder when it filed its lien. By operation of MCIOA and the Recording Act, the Association became second in priority to Wells Fargo. While Washington Mutual may attack Wells Fargo's interest in the property, it may not collaterally attack the interest of the Association which relied in good faith upon the records as they appeared in the recorder's office.

Respectfully submitted,

HELLMUTH & JOHNSON, PLLC

Dated: January 22, 2008

By



Erik F. Hansen (#0303410)
Joel A. Hilgendorf, (#315953)
Chad A. Johnson, (#225149)
Hellmuth & Johnson, PLLC
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
(952) 941-4005

*Attorneys for Appellant Lake Forest
Townhomes Condominium Association*

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CERTIFICATE OF REPLY BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 1,315 words. This brief was prepared using Microsoft Word 2002.

HELLMUTH & JOHNSON, PLLC

Dated: January 22, 2008

By 

Erik F. Hansen (#0303410)
Joel A. Hilgendorf, (#315953)
Chad A. Johnson, (#225149)
Hellmuth & Johnson, PLLC
10400 Viking Drive, Suite 500
Eden Prairie, MN 55344
(952) 941-4005

*Attorneys for Appellant Lake Forest
Townhomes Condominium Association*